

LIBRARY
SUPREME COURT U.S.

No. 51

Office - Supreme Court, U. S.

FILED

SEP 14 1950

RECEIVED CLERK OF SUPREME COURT

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA,

Petitioner

**EDYNE LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE
OF DUDLEY G. GRIGGS, DECEASED**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

PRAYER FOR THE UNITED STATES

9

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	3
Argument	8
I. The clear implication of the <i>Brooks</i> opinion, especially when considered in the light of the cases of which it spoke with approval, is that no recovery may be had under the Federal Tort Claims Act for an injury or death incident to the service	9
1. The <i>Brooks</i> opinion impliedly recognized a service-incident injury as being a valid exception to the Court's holding in that case	9
2. The majority of the court below should have recognized and applied the service-incident injury doctrine in this case	13
II. The Federal Tort Claims Act was not intended by Congress to apply to claims by servicemen for injuries or deaths incident to their service	19
A. Allowing suits on service-caused injury or death claims would lead to consequences which Congress should not be presumed to have intended	21
1. It would subject the government-soldier relationship to dissimilar state laws	21
2. It would subject service-caused injury and death claims to judicial scrutiny and thereby impair military discipline	24
B. The provisions of the Military Claims Act, which were supplanted by the Federal Tort Claims Act, confirm the view that Congress intended to exclude such claims from the latter Act	29
C. Administrative construction of the Act confirms the view that service-caused injuries and deaths are not cognizable thereunder	30
III. Neither the language nor the statutory scheme of the Federal Tort Claims Act will permit recovery thereunder of damages resulting from a service-incident injury negligently inflicted by one member upon another member of the armed services	33

	Page
IV. Reversal of the judgment below would not leave respondent financially unprotected	37
Conclusion	39
Appendix	40

CITATIONS

Cases:

<i>Adams v. United States</i> , 319 U. S. 312	32
<i>Alzua v. Johnson</i> , 231 U. S. 106	35
<i>Bates v. Clark</i> , 95 U. S. 204	36
<i>Bishop v. Vandercook</i> , 228 Mich. 299	36
<i>Boston Sand Co. v. United States</i> , 278 U. S. 41	99 19
<i>Bradley v. United States</i> , 151 F. 2d 742, certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880 4, 10, 14, 17, 20	35
<i>Bradley v. Fisher</i> , 13 Wall. 335	35
<i>Brooks v. United States</i> , 337 U. S. 49, 3, 4, 8, 9, 10, 12, 13, 14, 20, 28, 30	34
<i>Dawkins v. Paulet</i> , 5 L. R. 94	18
<i>Dembrod v. New York</i> , 185 Misc. 1061, 58 N. Y. Supp. 2d 490	32
<i>Eduard's Lessee v. Darby</i> , 12 Wheat. 206	34
<i>Dobson v. United States</i> , 27 F. 2d 807, certiorari denied, 278 U. S. 653 4, 10, 14-17, 20	32 34
<i>Edmonson v. Rundle</i> , 19 T.L.R. 356	34
<i>Dinsman v. Wilkes</i> , 12 How. 390	30
<i>Feres v. United States</i> , 177 F. 2d 535	3, 8, 28
<i>Feres v. United States</i> , No. 9, this Term	11
<i>Foster v. United States</i> , 43 C. Cls. 170	18
<i>Goldstein v. New York</i> , 281 N. Y. 396	35
<i>Gregoire v. Biddle</i> , 177 F. 2d 579, certiorari denied, 339 U. S. 949	25
<i>Grimley, In re</i> , 137 U. S. 147	36
<i>Herlihy v. Donahue</i> , 52 Mont. 601	11
<i>Hunt v. United States</i> , 38 C. Cls. 704	10, 30
<i>Jefferson v. United States</i> , 77 F. Supp. 706	13, 24, 26
<i>Jefferson v. United States</i> , 178 F. 2d 518	3, 8, 24
<i>Jefferson v. United States</i> , No. 29, this Term	34, 35
<i>Johnstone v. Sutton</i> , 1 T.R. 492, 99 English Reprint 1215	34
<i>Keighly v. Bell</i> , 4 Fost. & Fin. 763	18
<i>Kennedy v. New York</i> , 16 N. Y. Supp. 288	36
<i>Little v. Barreme</i> , 2 Cranch 170	24
<i>Long v. United States</i> , 78 F. Supp. 35	35
<i>Mansergh, In re</i> , 1 Best & Smith 400	34, 36
<i>Martin v. Mott</i> , 12 Wheat. 19	18
<i>McAuliffe v. New York</i> , 107 Misc. 553, 176 N. Y. Supp. 679	25, 36 35
<i>McCall v. McDowell</i> , 15 Fed. Cases 1235	36
<i>Mitchell v. Harmony</i> , 13 How. 115	

Cases—Continued

	Page
<i>Monroe v. Chase</i> , 76 F. Supp. 278	38
<i>Moon v. Hines, Director General of Railroads</i> , 205 Ala. 355	17
<i>N. O. & N. E. Railroad Co. v. Jopes</i> , 142 U. S. 18	33
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U. S. 294	32
<i>Parmiter v. United States</i> , 75 F. Supp. 823	24
<i>Randall v. Brigham</i> , 7 Wall. 523	35
<i>Samson v. United States</i> , 79 F. Supp. 406	30
<i>Sandoval v. Davis</i> , 288 Fed. 56	17
<i>Seidel v. Director General of Railroads</i> , 149 La. 414	17
<i>State v. Sparks</i> , 27 Tex. 627	36
<i>State of Maryland v. United States</i> , 165 F. 2d 869	24
<i>Tyler v. Pomeroy</i> , 8 Allen 480	35
<i>United States v. American Trucking Associations, Inc.</i> , 310 U. S. 534	20, 32
<i>United States v. Brooks</i> , 169 F. 2d 840	10, 12, 28
<i>United States v. Brooks</i> , 176 F. 2d 482	39
<i>United States v. Campbell</i> , 172 F. 2d 500, certiorari denied, 337 U. S. 957	33
<i>United States v. Citizens Loan & Trust Co.</i> , 316 U. S. 209	32
<i>United States v. Dickerson</i> , 310 U. S. 554	20
<i>United States v. Eleazer</i> , 177 F. 2d 914, certiorari denied, 339 U. S. 903	33
<i>United States v. Madigan</i> , 300 U. S. 500	32
<i>United States v. Spelar</i> , 338 U. S. 217	24
<i>United States v. Standard Oil Co.</i> , 332 U. S. 301	21, 23
<i>United States v. Williamson</i> , 23 Wall. 411	11
<i>Vanderheyden v. Young</i> , 11 Johns. 150	34
<i>Ward v. Bailey</i> , 4 Taunton 611	34
<i>Weaver v. Ward</i> , Hobart 135, 80 English Reprint 284	36
<i>Wiltse v. United States</i> , 74 F. Supp. 786	24
<i>Wright v. White</i> , 166 Oregon 136	34, 36
<i>Yaselli v. Goff</i> , 12 F. 2d 396, affirmed, 275 U. S. 503	35

Constitution and Statutes:

<i>United States Const.</i> , Art. I, Sec. 8	23
<i>Act of December 17, 1919</i> , as amended, 41 Stat. 367, 57 Stat. 599, 10 U.S.C. 903	38
<i>Act of June 25, 1948</i> , 62 Stat. 683, 862	2

Articles of War:

63, 10 U.S.C. 1535	25
64, 10 U.S.C. 1536	25
65, 10 U.S.C. 1537	25
96, 10 U.S.C. 1568	25

<i>Federal Tort Claims Act</i> , Sec. 424(a), 60 Stat. 846	29
<i>Military Claims Act</i> , 31 U.S.C. 223b, 223d	6, 12, 29

Constitution and Statutes—Continued

United States Code, Title 28:	Page
Public Vessels Act, 43 Stat. 112, 46 U.S.C. 781	14, 20
Suits in Admiralty Act, 46 U.S.C. 741	20
Sec. 1346(b)	2, 23, 40
Sec. 1402(b)	2, 40
Sec. 2672	6, 31
Sec. 2674	2, 41
Sec. 2680	2, 20, 41
Illinois Injuries Act, Illinois Revised Statutes, chapter 70, as amended by the Act of July 18, 1947, Laws of Illinois, 1947 (p. 1094)	38
New York Tort Claims Act, Laws of New York, 1920, c. 922, sec. 12; Laws of New York, 1939, c. 860, sec. 8	18

Miscellaneous:

AR 600-10, Sec. 2 (e) (9)	11, 27
Articles for the Government of the Navy of the United States, Article 8, United States Navy Regulation 1948, p. 5	26
10 C.F.R. 1947 Supp. 306.29(1)	31
32 C.F.R. (1949 Ed.) 536.29 (1) (12)	6, 32
32 C.F.R. (1949 Ed.) 750.3 (e) (1)	6, 32
34 C.F.R. 1948 Supp. 536.29 (1) (12)	31
12 F.R. 1476, 1478	31
13 F.R. 5964, 5988, October 13, 1948	31
U. S. Life Tables and Actuarial Tables 1939-1941, Thomas N. E. Greville, Govt. Printing Off., 1948, p. 37	38

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 31

UNITED STATES OF AMERICA,

Petitioner

v.

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE
OF DUDLEY R. GRIGGS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the district court (R. 5) is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 6-9) is reported at 178 F.2d 1.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1949 (R. 9). A petition for re-

hearing was denied on January 9, 1950 (R. 26-27). The petition for a writ of certiorari was filed on March 16, 1950, and was granted on May 8, (R. 29). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether damages may be recovered under the Federal Tort Claims Act for the death of a member of the armed forces, where the death was incident to his military service and caused by the alleged negligence of other military personnel.

STATUTE INVOLVED

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act],¹ are set forth in the Appendix, *infra*, pp. 40-43.

STATEMENT

Respondent Griggs brought this suit against the United States in the United States District Court for the District of Colorado to recover damages under the Federal Tort Claims Act for the wrong-

¹ The Act of June 25, 1948, repealed the Federal Tort Claims Act, but re-enacted all of its provisions into the codification of Title 28, which took effect September 1, 1948 (62 Stat. 683, 862). The new code citations are accordingly used throughout this brief, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act. The rights of litigants in pending suits, under the former law, are, of course, preserved (62 Stat. 683, 862), but the revision does not appear to have changed the applicable law in any respect which is here material.

ful death of her husband (R. 2). Her complaint alleged that on November 30, 1947, her husband, who then "was on active duty" as a "Lieutenant Colonel in the Army of the United States," was directed by "official orders" to report to the "Army Hospital at Scott Field Army Air Base, * * * Illinois, for the purpose of submitting to treatment and an operation" (R. 2). The complaint further alleged that he died while undergoing this treatment as a result of the negligence of the Army Medical Corps members who treated him (R. 3).

The district court sustained the motion of the United States to dismiss on the ground that the complaint did not state a claim on which relief could be granted under the Federal Tort Claims Act (R. 5). The Court of Appeals for the Tenth Circuit reversed, with Circuit Judge Huxman dissenting (R. 6-9). A petition for rehearing in which the court of appeals' attention was specifically directed to the then recent opinions in *Feres v. United States* and *Jefferson v. United States* (R. 9-26) was denied without comment (R. 27).

SUMMARY OF ARGUMENT •

I

1. This case and its companion cases (Nos. 9 and 29) involve the specific question left open by this Court in *Brooks v. United States*, 337 U. S. 49, i. e., whether recovery against the United States may be had under the Federal Tort Claims Act for death or

injury incident to the service of a member of the armed forces.

The *Brooks* opinion impliedly recognized that a service-incident injury was a valid exception to this Court's holding in that case. The "wholly different case" involving a service-caused injury context which this Court differentiated so prominently in the *Brooks* case is now presented. There is ample basis within the framework of the *Brooks* opinion to deny recovery under the Tort Claims Act on a service-caused claim, while granting recovery in a non-service-incident context. The distinction also finds justification in (1) the need for avoiding application of state laws to military matters, (2) the desirability of avoiding judicial review of military orders, and (3) the postulate that military discipline must not be impaired.

2. The court below should have recognized and followed the doctrine enunciated by the Court of Appeals for the Second Circuit in *Dobson v. United States*, 27 F. 2d 807, certiorari denied, 278 U. S. 653, and *Bradey v. United States*, 151 F. 2d 742, certiorari denied, 326 U. S. 795, to the effect that the Public Vessels Act does not apply to service-caused claims despite the fact that that Act contains broad language and does not expressly exclude such claims. Those cases were recognized by this Court as controlling in a service-incident injury context such as is here presented. Various other cases in-

volving other and similar laws have denied recovery in like contexts.

II

A. The broad language of the Federal Tort Claims Act cannot be properly interpreted without giving consideration to the consequences of reading the Act to include service-caused claims, and the consequences which would follow such an interpretation are so disturbing as to make it clear that Congress did not intend to include such claims therein. Thus, one consequence of including such claims within the Act would be the subjection of the government-soldier relationship to the dissimilar and varying state laws, a departure from the well-established rule that incidents of the government-soldier relationship must be determined by federal authority.

Another serious consequence that would follow such an interpretation is that it would subject the government-soldier relationship to judicial scrutiny, and thereby impair military discipline. It is a postulate that a well-disciplined military organization shall be self-regulating. To allow soldiers access to the courts in connection with injuries sustained by them while acting under military orders would be to vest in the courts the power to pass upon the propriety of military decisions. In the case at bar, the deceased officer was submitting to military orders in taking treatment. Had he refused the

treatment he would have been guilty of a breach of military discipline. Consequently, judicial review of the treatment or need for the treatment would be judicial review of a military decision. Instances of members of the armed forces being injured while carrying out military orders may be multiplied, and the threat to military discipline would be a serious one if judicial scrutiny were permitted to follow each incident.

B. The Military Claims Act (31 U. S. C. 223b), which was repealed by the Federal Tort Claims Act, did not permit the allowance of claims for injury if such claims were service-caused. The instant claim, arising out of a service incident, would not therefore have been allowable under that Act. The repeal of that Act should not be interpreted as making cognizable under the Tort Claims Act service-caused claims not recognized by the repealed Act.

C. The Federal Tort Claims Act authorizes administrative adjustment of tort claims not exceeding \$1,000. 28 U. S. C. 2672. This provision has received a uniform administrative construction by both the Army and Navy Departments which excludes service-incident claims from the coverage of the Act. 32 C. F. R. (1949 Ed.) 536.29 (1) (12) and 750.3(c)(1). This consistent administrative construction is reasonable and is entitled to great weight. It should not, therefore, be lightly overturned.

III

The statutory scheme embodied in the Federal Tort Claims Act is unsuited to deal with service-caused claims. The United States made itself liable in tort only under the doctrine of *respondent superior*. Thus, the United States becomes liable only if the negligent employee would have become personally liable for his act.

It has long been the established rule that a soldier, in an action instituted by another soldier, may not be held personally liable for his negligence occurring in the course of their military service. This rule was long recognized and followed at common law and has been regularly acknowledged in the United States. The considerations underlying this rule are the impairments to military discipline which would result from judicial intrusion into the government-soldier relationship. It follows that under that rule the army surgeon charged with carelessness in the case at bar could not have been held personally liable for his alleged negligence, and the doctrine of *respondent superior*, upon which the Tort Claims Act is founded, prohibits the imposition of derivative liability upon the United States under that Act in this case.

IV

The reversal of the judgment of the court below does not leave respondent unprotected. She is entitled under the appropriate military and veterans'

benefit laws to pension and other payments estimated to aggregate an amount in excess of \$22,000, which would have to be compared with and charged proportionately against the \$15,000 maximum recovery permitted by the law of Illinois for wrongful death. Thus, it is not clear that respondent would be entitled to receive a benefit from this suit in any event. Exclusion of service-caused claims from the Tort Claims Act will, therefore, work no apparent hardship on respondent.

ARGUMENT

This case and its companion cases, *Feres v. United States*, No. 9 this Term, and *Jefferson v. United States*, No. 29, this Term, involve the question specifically left open by this Court in *Brooks v. United States*, 337 U. S. 49—namely, whether recovery may be had against the United States in a suit brought under the Federal Tort Claims Act for an injury to or death of a member of the armed forces incident to his service. While the courts below in all of these cases recognized that the *Brooks* decision specifically left this question open, each court drew support from that opinion to establish its view. The majority of the court below adhered strictly to the first five paragraphs of the *Brooks* opinion and declined to follow or explore the other considerations set forth in the remainder of the opinion. The Courts of Appeals for the Second and Fourth Circuits in the *Feres* and *Jefferson* cases, respectively, treated the first five paragraphs

of the *Brooks* opinion as applying exclusively to the right to recover for an injury *not* incident to the service and, following the applicable rules of statutory interpretation suggested in the remainder of the *Brooks* opinion as well as drawing upon other pertinent material, concluded that the Federal Tort Claims Act did not permit recovery for injuries incident to the service. We submit that the approach taken by the majority of the court below in the instant case led to an erroneous conclusion, and that the course followed by the Courts of Appeals for the Second and Fourth Circuits led to the correct result.

I

The Clear Implication of the *Brooks* Opinion, Especially When Considered in the Light of the Cases of Which It Spoke With Approval, Is That No Recovery May Be Had under the Federal Tort Claims Act for an Injury or Death Incident to the Service

1. *The Brooks opinion impliedly recognized a service-incident injury as being a valid exception to the Court's holding in that case.* In the *Brooks* case, 337 U. S. 49, 50, this Court stated "The question is whether members of the United States armed forces can recover under that [the Federal Tort Claims] Act for injuries not incident to their service." It answered that question in the affirmative (*id.*, p. 51). The Court, however, was careful to point out that that case dealt "with an accident that had nothing to do with Brooks' army careers,

* * *” and that “Were the accident incident to the Brooks’ service, a wholly different case would be presented” (*id.*, p. 52). And in commenting upon the “wholly different case,” this Court specifically referred to a tort action grounded on a “battle commander’s poor judgment, an army surgeon’s slip of hand, a defective jeep,” and cited *Jefferson v. United States*, 77 F. Supp. 706 (D. Md.), *Dobson v. United States*, 27 F. 2d 867 (C.A. 2), and *Bradley v. United States*, 151 F. 2d 742 (C.A. 2), as illustrative (*id.*, p. 52)—all of which cases, like the instant case, involved service-caused injuries or deaths.

The factual situation here provides precisely the “wholly different case” involving the incident-to-service injury contemplated by this Court’s opinion in the *Brooks* case. This is clearly borne out by a comparison of the facts in the two cases:

(1) In the *Brooks* case, the soldiers were riding in a private automobile on a public highway when they were struck by a government vehicle driven by a civilian employee. They were “on leave or furlough, engaged in their private concerns and not on any business connected with their military service” (*United States v. Brooks*, 169 F. 2d 840, 841 (C.A. 4). They were not on the highway, where they were hit by the government car, because of their being soldiers.⁶ The accident, out of which their claims under the Act arose, was not caused by their military service, nor did any of their military responsi-

bilities, assignments, or activities have any relationship to the accident. Since they were on leave, no military requirement had directed them to be on that highway or in the car involved in the accident. They were, at that time, on their own and voluntarily spending their leave in the manner they had selected for their own personal convenience.²

(2) In the instant case, there was no leave or furlough. It was only because Lt. Colonel Griggs was on active duty that he was operated on by an Army doctor on an Army operating table in an Army hospital, where the alleged negligence occurred. Because he was then on active duty in the military service, any refusal on his part to submit to Army medical or surgical treatment considered "necessary to enable [him] to perform properly his military duties" would have constituted a breach of military discipline, punishable by court martial. AR 600-10, Sec. 2(e) (9). His submission to the Army operation, and any negligence on the part of other Army personnel in the course of that operation, therefore, was not only incident to his service but a direct result thereof.

² A serviceman "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses." *United States v. Williamson*, 23 Wall. 411, 415. The leave is a favor extended "for his sole accommodation" to permit him to enjoy "a respite from military duty." *Foster v. United States*, 43 C. Cls. 170, 175. "A leave of absence or a furlough is a favor extended. A soldier can not have a furlough forced upon him." *Hunt v. United States*, 38 C. Cls. 704, 710.

It is clear, therefore, that there is present in the instant case the precise factual distinction which this Court stressed in the *Brooks* case by pointing out numerous circumstances and factors which seemed, instinctively, to raise formidable doubts that recovery would be proper should that factual difference exist.³ Hence, there is, we submit, not only cogent suggestion but also ample basis within the framework of the *Brooks* opinion, for withholding recovery in the instant case where the alleged injury was incident to the service in every respect, while permitting recovery in a case, such as the *Brooks* case, involving non-service-incident injuries.

The service-incident injury distinction was regarded as critically significant by Judge Parker in his dissent from the Court of Appeals' first opinion in the *Brooks* case (169 F. 2d 846-850), with which dissent the majority of this Court stated its agreement (337 U. S. at p. 51). That dissent was, in fact, based on Judge Parker's understanding that a different result, i.e., one prohibiting recovery under the Act, would be required if the claim had arisen "out of injuries connected with the military service of plaintiffs, as was the case in *Jefferson v. United States*, 77 F. Supp. 706." See 169 F. 2d 840, 850. Judge Parker's continued adherence to this distinction is evidenced by his concurrence in the

³ Significantly, one of the circumstances pointed out by this Court was the fact that the service-incident distinction appeared in the Military Claims Act (31 U.S.C. 223b) which was repealed by the Tort Claims Act.

unanimous opinion of the Court of Appeals for the Fourth Circuit, in denying recovery in *Jefferson v. United States* (R. 22-25) on the ground that the plaintiff's injuries were caused by his military service.

Moreover, the distinction finds ample justification for its recognition in the need for avoiding the application of varying state laws in adjudicating service-caused claims, in the desirability of avoiding judicial review of service-caused claims arising as a result of the execution of military commands, and in the postulate that effective military discipline must not be impaired. Each of these considerations is significant and is fully applicable to situations involving service-caused injuries. They are of no consequence where the injuries, like those in the *Brooks* case, were caused during plaintiff's free time when he had all of the essential attributes of a private citizen rather than those of a soldier in the military service, and secondly, where the injuries were caused not by another soldier but by a civilian.

2. *The majority of the court below should have recognized and applied the service-incident injury doctrine in this case.* The service-incident distinction has been recognized and held in numerous instances as being a valid ground for barring recovery under other statutes, regardless of the fact that the particular statute involved contained no express provision either including or excluding its application.

In its opinion declining to apply the service-incident injury doctrine in the instant case, the court below makes no reference to *Dobson v. United States*, 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U. S. 653, or to *Bradey v. United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880, although both cases were strongly urged upon it. Those cases arose under the Public Vessels Act (43 Stat. 112, 46 U.S.C. 781), which authorizes the institution of *in personam* suits against the United States for damages caused by the employees of its public vessels. And, in both cases, the Court of Appeals for the Second Circuit unanimously ruled that despite the absence of any express exclusionary provision in the Public Vessels Act, that Act did not authorize a recovery against the United States for the death of a member of the armed forces incurred incident to his service:

In the *Brooks* case, this Court pointed out that the *Dobson* and *Bradey* cases, while not pertinent in a situation where the serviceman was injured while on furlough, would have relevance if the accident had occurred incident to the soldier's military service (337 U. S. 49, 52).

In the *Dobson* case, libels were filed under the Public Vessels Act by the legal representatives of deceased naval officers who, while on duty in the naval service aboard the United States submarine S-51, had lost their lives incident to their service when the submarine collided with another vessel on

the high seas and sank. It was alleged that the submarine was unseaworthy in that proper navigational lights were not displayed and that this defect caused the collision and consequent loss of lives without contributory fault on the part of the officers. On exceptions filed by the United States, the libels were dismissed. The Court of Appeals for the Second Circuit, in affirming the dismissal of the libels, held (1) that the imposition of liability on the United States for the death of a sailor sustained incident to his service involved too radical a departure from the Government's long-standing policy with respect to the personnel of its naval forces and therefore could not be accepted, and (2) that Congress, notwithstanding its authorization of wrongful death actions against the United States under the Public Vessels Act, meant to leave upon servicemen the same risks of injuries suffered in the service of the United States as they had before. Judge Swan, speaking for a unanimous court, stated (27 F. 2d 808, 809):

Verbally, there is nothing [in the Public Vessels Act] which excludes liability for damage to property or person of officers or crew.

* * *

Nevertheless the construction contended for by appellants involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To

allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms. The Act of October 6, 1917 (40 Stat. 389, [34 USCA ss 981, 982]) directs the Paymaster General of the Navy to reimburse officers, enlisted men, and others in the naval service * * *.

Chapter 3, title 38, of the United States Code (38 USCA ss 151-206) provides an elaborate pension system for personal injury and loss of life incurred by officers and enlisted men in the navy. These pensions may be thought an inadequate substitute for the recovery of full damages under the Public Vessels Act of March 3, 1925, but they were well known to all who entered the naval service. * * * If it had been the purpose to change that policy as respects officers and seamen of the navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found in the above-quoted section P. * * *

* * * * *

We believe that Congress meant to leave upon the members of the naval forces the same risks of injuries suffered in the service of the United States as they had before. * * *

Similarly, in the *Bradey* case a libel was filed by the legal representatives of a sailor, who died in 1944 as a result of injuries sustained while on duty

in the fireroom of the Navy destroyer upon which he had been serving. The district court's dismissal of this libel was again unanimously affirmed by the Court of Appeals, relying on its earlier decision in the *Dobson* case.

The need for considering the *Dobson* and *Bradey* cases in construing the Federal Tort Claims Act in the instant case is thus evident, and the fact that those decisions were made in the service-incident context so prominently pointed out by this Court in the *Brooks* case, and now presented in the case at bar, makes it abundantly clear that the doctrine of those cases should have been applied by the court below in this case.

Cases arising under other statutes waiving governmental immunity from tort suits, and holding that a serviceman may not recover for personal injuries sustained incident to his service, are in accord with the *Dobson* and *Bradey* cases. See *Seidel v. Director General of Railroads*, 149 La. 414, 89 So. 308; *Moon v. Hines, Director General of Railroads*, 205 Ala. 355, 87 So. 603; *Sandoval v. Davis*, 288 Fed. 56 (C. A. 6); see also *Goldstein v. New York*, 281 N. Y. 396, 24 N. E. 2d 97.⁴

⁴ In the *Goldstein* case, a private in the service of the State militia was killed in the line of duty as a result of the negligence of another serviceman. A wrongful death suit was brought against the State under the New York Tort Claims Act (Laws of New York, 1920, c. 922, sec. 12; Laws of New York, 1939, c. 860, sec. 8), in which the State, like the federal government under the Federal Tort Claims Act, had waived its immunity from liability for the torts of its employees. Even though the New York Act, like its federal counterpart and like the Public Vessels Act involved in the *Dobson* and *Bradey* cases, did not expressly exclude actions based on the

In each of these cases, the courts were faced with the identical problem presented in the court below and now here. All involved service-caused claims of members of the armed forces, or their representatives, under statutes waiving governmental immunity from tort suits. There, as here, the claimants strongly urged that the broad language of the statutes, and the failure to exclude expressly service-caused claims, required that they be recognized under those acts. But, for the reasons indicated, no such mechanical result was per-

death of a serviceman incident to his service, the New York Court of Appeals dismissed the action and stated (281 N. Y. 396, 403):

"The question still remains whether the State has waived its immunity from liability to members of the militia and obligated itself to respond in damages for injuries negligently inflicted in active service by one member of the militia upon another and has granted to the Court of Claims authority to determine such liability and award a judgment for money damages therefor.

"The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through the negligence of a brother soldier or officer, except as provided in the Military Law, is rather startling. We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of a pension. That this State has done in the Military Law (§§ 220-224), wherein it is provided when an allowance may be made, for what it may be made, the procedure to be followed and the amount that may be allowed. In fact, a complete system is set up for handling such claims. To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable."

For additional New York holdings in accord with the *Goldstein* case, see *Kennedy v. New York*, 16 N.Y. Supp. (2d) 288; *McAuliffe v. New York*, 107 Misc. 553, 176 N.Y. Supp. 679. See, also, *Dembrod v. New York*, 185 Misc. 1061, 58 N.Y. Supp. (2d) 490.

mitted in any of those cases. Nor was there, we submit, any justification for the majority of the court below to ignore those cases and allow such a mechanical result in this case.

II

The Federal Tort Claims Act Was Not Intended by Congress to Apply to Claims by Servicemen for Injuries or Deaths Incident to Their Service

The Federal Tort Claims Act does not, in terms, either include or exclude claims for the death or injury of a member of the armed forces, sustained incident to his military or naval service and as a result of the negligence of other members of those forces in carrying out their duties. Certain broad language of the Act, coupled with the fact that claims of this character are not specifically excluded, is seized upon by respondent in the case at bar as sufficient basis for the assertion of such a claim. But it is obvious that the broad language of the Act cannot properly be interpreted without giving consideration to the consequences of reading the Act, as respondent does, to permit servicemen to sue for service-incident claims. See *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 543; *Boston Sand Co. v. United States*, 278 U. S. 41, 48; *United States v. Dickerson*, 310 U. S. 554, 561. In fact, with respect to the very issue presented by this case, this Court has admonished that interpretation of the broad language of the Federal Tort Claims Act must

take into account the consequences resulting from such an interpretation, "for those consequences may provide insight for determination of congressional purpose." *Brooks v. United States*, 337 U. S. 49, 52. Especially significant are two such consequences: (1) the subjection of the unique relationship between the United States and its soldiers to the varying laws of the different states, and (2) judicial intrusion into the realm of military and naval affairs.⁵ In our view, these consequences point decisively to a congressional intent to exclude from the Act claims of military

⁵ A third possible consequence is also worthy of consideration. Congress expressly excluded from the Tort Claims Act (28 U.S.C. 2860(d), *infra*, p. 42) claims for which there is a remedy under the Suits in Admiralty Act (46 U.S.C. 741-752) or the Public Vessels Act (46 U.S.C. 781-790), i.e., admiralty claims against the Government. However, as we have pointed out, *supra*, pp. 14-19, the *Dobson* and *Bradey* cases hold that service-caused claims are not within the purview of those Acts. If service-caused claims are within the coverage of the Tort Claims Act, that Act would seem to include the admiralty claims excluded from the Suits in Admiralty and the Public Vessels Acts by those cases. Otherwise, the Tort Claims Act would work a discrimination against members of the naval forces and the marines, since it would permit recovery for service-caused injuries occurring on land but deny recovery for those occurring on board ship. If, on the other hand, that Act includes service-caused claims occurring both on land and on board ship, then it causes a division of admiralty claims, preserving for a part of them the traditional federal admiralty procedure and subjecting the remainder to adjudication under varying state laws. It seems most unlikely that Congress would desire to work such a discrimination, and it is even less likely that it would, while expressly excepting a part of the admiralty claims from the Act, tacitly create a remedy for the remainder which would make them subject to state laws. We believe it would be unreasonable to impute to Congress an intention to do either in the absence of language indicating that it had one of the novel purposes in mind.

or naval personnel for injuries or deaths caused by their service. This view is strongly supported by the fact that the Federal Tort Claims Act supplanted the Military Claims Act which itself expressly precluded recovery for service-incident injuries or deaths, and accords with the contemporary administrative construction.

A. Allowing Suits on Service-Caused Injury or Death Claims Would Lead to Consequences Which Congress Should Not Be Presumed to Have Intended.

1. *It would subject the government-soldier relationship to dissimilar state laws.* What is involved here is a claim advanced against the United States on behalf of one soldier for damages sustained in active service as a result of the negligence of other military personnel. It is a claim arising directly out of, and only by virtue of, the government-soldier relationship. In determining the rights or liabilities growing out of this unique government-soldier relationship, it is well established that the United States cannot be subjected to the force of dissimilar and frequently irreconcilable state statutes and decisions. Even where the interference with the government-soldier relationship was caused not by a soldier but by a party outside of the military establishment, this Court has observed (*United States v. Standard Oil Co.*, 332 U. S. 301, 305-306, 310):

Perhaps no relation between the Government and a citizen is more distinctively fed-

eral in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, *the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.* See *Tarble's Case*, 13 Wall. 397; *Kurtz v. Moffitt*, 115 U. S. 487. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.

* * * * *

Leaving out of account, therefore, any supposed effect of the *Erie* decision, we nevertheless are of opinion that state law should not be selected as the federal rule for governing the matter in issue. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines. [Emphasis supplied.]

The reasoning underlying the necessary application of federal, rather than state law, in defining the reciprocal rights and duties arising out of the relationship, is apparent. The position of the United States with respect to that relationship, as the *Standard Oil* case shows, stems from peculiarly "federal sources". It rests on the constitutional authority to "declare War", "^{provide}~~provide~~ for the Common Defence", "raise and support Armies", and "make Rules for the Government and Regulation of the land and naval Forces". United States Const., Art. I, Sec. 8. All of the "legal incidents" of that relationship must therefore, as this Court observed, be "governed by federal authority," rather than by different state laws. *United States v. Standard Oil Co.*, 332 U. S. 301, 305, 306.

The Federal Tort Claims Act, on the other hand, adopts the law of the state in which the injury or death has occurred with respect to establishing the liability of the United States. The Act expressly subjects the United States to liability for the negligent or wrongful acts of its employees to the same extent that liability is imposed "in accordance with the law of the place where the act or omission occurred." (28 U.S.C. 1346(b), Appendix, *infra*, p. 40.) By reason of the incorporation of the *lex loci delicti* into the Act, the courts are required to refer to the local statutory and decisional law in determining whether a tortious and actionable wrong has been committed. *United*

States v. Spelar, 338 U. S. 217, 219; *State of Maryland v. United States*, 165 F. 2d 869, 871 (C.A. 4); *Long v. United States*, 78 F. Supp. 35, 37 (S.D. Calif.); *Parmiter v. United States*, 75 F. Supp. 823, 824 (D. Mass.); *Wiltse v. United States*, 74 F. Supp. 786, 787 (W.D. La.).

Consequently, if soldiers' service-caused injuries or deaths are held to be cognizable under the Act, it would force a departure from the well-established rule requiring the incidents of government-soldier relationship to be determined exclusively by federal authority. Instead of the uniform treatment of such claims, made possible only by use of federal law, those claims would be disposed of on the basis of varying state laws. Such a result should not be lightly attributed to Congress. As observed by the Court of Appeals for the Fourth Circuit in its opinion in the *Jefferson* case (R. 24):

* * * it is not reasonable to suppose, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships within the military establishment to the law of negligence as laid down by the courts of the several states.

2. *It would subject service-caused injury and death claims to judicial scrutiny and thereby impair military discipline.* It is obvious that the military establishment, to function effectively,

must be a self-regulating body. It is for that reason that the military authorities have an absolute power of control over servicemen, enforced by rigorous sanctions. As this Court has pointed out (*In re Grimley*, 137 U. S. 147, 153):

* * * An army is not a deliberate body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. * * *

Accord: *McCall v. McDowell*, 15 Fed. Cases 1235, 1240 (C.C.D. Cal., No. 8673). Thus, disobedience of orders is an offense at military law. Articles of War 64 and 65; 10 U.S.C. 1536, 1537. Since unhesitating obedience is the vital attribute of an efficient army, disobedience of orders is punishable by death. AW 64; 10 U.S.C. 1536. Disrespect shown to officers and non-commissioned officers is an offense, even though no disobedience is involved. AW 63; AW 65; 10 U.S.C. 1535, 1537. Still other provisions furnish the military establishment with additional authority to deal with negligent conduct among military personnel. Article of War 96 (10 U.S.C. 1568) provides *inter alia* that "disorders and neglects to the prejudice of good order and military discipline, all conduct of

a nature to bring discredit upon military service" are court-martial offenses. Similarly, Article 8 of the Articles for the Government of the Navy of the United States makes punishable any neglect on the part of naval personnel "in obeying orders, or [in being] culpably inefficient in the performance of duty." United States Navy Regulation 1948, p. 5.

Allowing soldiers access to the courts under the Federal Tort Claims Act for injuries sustained by them in the execution of military orders would, in large part, shift this regulation and control from the military establishment to the courts, which would then "be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of [the soldiers]." *Jefferson v. United States*, 178 F. 2d 518 (C.A. 4) (R. 24). The facts here are illustrative. It was only because Lt. Colonel Griggs was a soldier on active duty that he was operated on by an Army doctor on an Army operating table in an Army hospital, where the alleged negligence occurred. His being on active duty in the armed forces required him to submit to that operation by an Army surgeon only because of the military relationship between the two of them. In the absence of his military obligations and in the absence of his active duty status the particular negligence now complained of would

not have taken place. As respondent herself emphasizes in the complaint it was while her husband "was on active duty" as a "Lt. Colonel in the Army of the United States" that "official orders" directed him to the "Army Hospital at Scott Field Army Air Base * * * for the purpose of submitting to treatment and operation" (R. 2-3). Had he refused medical or surgical treatment considered "necessary to enable [him] to perform properly his military duties" he would have been guilty of a breach of military discipline and subject to trial by court martial. AR 600-10, Sec. (e) (9). Accordingly, if respondent's assertion that such treatment was negligent allows her access to the courts under the Federal Tort Claims Act, it is obvious that the military decisions, orders, and conduct which constituted the basis for the treatment and operation would be thrown open to judicial examination.

Similar instances could be multiplied. The negligent discharge of firearms, the careless setting of an automatic machine gun in combat training, the negligent storage of ammunition, the negligent placement of barbed wire and shells along an infiltration course, negligence in ordering exhausted troops to hike an additional 25 miles, negligence in ordering troops to sleep in barracks not large enough to accommodate all, improper facilities for cleaning mess gear, the negligent quartering of troops in non-fireproof

barracks⁶—each of these events and many more would require the military's historic right to self-regulation to yield to judicial scrutiny of military decisions which can best be resolved by the military establishment itself rather than by the civil courts, and which must be resolved by the military establishment alone in order to preserve essential military discipline. This was forcefully pointed out by the Court of Appeals for the Fourth Circuit. In discussing the "added and greater reason for denying recovery where the injury is service-caused * * * than where the injury is not service-caused," that court emphasized (*United States v. Brooks*, 169 F. 2d 840, 845, reversed as to non-service caused injuries. *Brooks v. United States*, 337 U. S. 49):

* * * the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the armed service of their country. If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grouching of the American soldier would result in the devastation of military discipline and morale.

⁶ See *Feres v. United States*, No. 9, this Term, involving negligence in quartering troops in unsafe barracks.

B. The Provisions of the Military Claims Act, which were Supplanted by the Federal Tort Claims Act, Confirm the View that Congress Intended to Exclude Such Claims from the Latter Act.

The Military Claims Act (31 U. S. C. 223b) authorized the Secretary of the Army to settle claims of military personnel for injury or death caused by other Army personnel. However, in that same Act, Congress, recognizing the danger of allowing suit on service-caused claims, specifically provided that the Act did not apply to an injury or death occurring incident to the soldier-claimant's military service.⁷ The instant claim, arising out of a service-incident situation, would not therefore have been cognizable under that Act. Section 424(a) of the Federal Tort Claims Act (60 Stat. 846) repealed the Military Claims Act in so far as it covered matters otherwise cognizable under the Federal Tort Claims Act.⁸ That repeal certainly should not be interpreted as making cognizable under the Federal Tort Claims Act service-caused claims which had theretofore not been recognized under the repealed statute. To the contrary, application of the well-established rule that a new or substitute statute must be interpreted in light of the enactment

⁷ These provisions also apply to the authority conferred on the Secretary of Navy with respect to torts of naval personnel. 31 U. S. C. 223d.

⁸ It also repealed the Navy statute referred to in the preceding footnote. 60 Stat. 846.

which it supplanted, fortifies the conclusion that the Federal Tort Claims Act, just like its predecessor Military Claims Act, does not include claims by servicemen for injury or death sustained by them incident to their military service and as a result of the negligence of other military personnel. Accordingly, the Court of Appeals for the Second Circuit, observing that soldiers had never "been treated as having claims for injuries incident to their service [citing 31 U. S. C. 223b]," saw no reason for allowing recovery on such a claim under the Federal Tort Claims Act, the successor to 31 U. S. C. 223b. *Feres v. United States*, 177 F. 2d 535 (R. 21). See also *Samson v. United States*, 79 F. Supp. 406, 408 (S. D. N. Y.); *Jefferson v. United States*, 77 F. Supp. 706, 715 (D. Md.).⁹

C. Administrative Construction of the Act Confirms the View that Service-Caused Injuries and Deaths are not Cognizable Thereunder.

The Federal Tort Claims Act authorizes administrative adjustment of claims of a thousand dollars or less, and vests in the head of each federal agency the power to make a final and conclusive

⁹ There are additional arguments which we suggest may be of significance in determining congressional intent in respect of the precise question here involved. They are set forth in our brief in the *Brooks* case, Nos. 388 and 389, October Term, 1948. We recognize that those arguments were not accepted in the *Brooks* case, and, in the context of that case, were dismissed without discussion as unavailing (337 U. S. at p. 52, n. 4). This Court might, however, desire to reexamine them in the light of the different considerations which here obtain.

settlement of such claims. 28 U. S. C. 2672. The substantive provisions of the Act are equally applicable to these claims for less than a thousand dollars as they are with respect to claims in excess of that amount as to which access to the courts is allowed. Shortly after enactment of the Federal Tort Claims Act, and in order to discharge its responsibility with respect to the administrative adjustment of tort claims, the Army issued regulations on March 4, 1947 (12 F. R. 1476, 1478), defining the conditions of payment by the War Department of any claim within the provisions of the Act. 10 C. F. R. 1947 Supp. 306.29(1). Among these conditions was the provision that "claims for personal injury or death of military personnel * * * incident to their service are not payable under the provisions of this" Act. The construction of the Act embodied in this regulation went into effect immediately, and has been consistently followed by the Army since that time. In revising its regulations in 1948, a similar provision was carried over in identical terms to Title 34 of the Code of Federal Regulations to which the provisions formerly appearing in Title 10 were transferred. See 34 C. F. R. 536.29(1) (12). That provision requires that prior to payment by the Army Department of any administrative claim under the Federal Tort Claims Act, a showing be made that the claim was not one for personal injury or death of military personnel incident to their service. 13 F. R. 5964, 5988, October 13,

1948. The identical provision was recodified in the 1949 Edition of the Code of Federal Regulations. 32 C. F. R. 536.29(1) (12). The Navy Department has also consistently refused to allow administrative recovery under the Act for personal injury or death claims of naval personnel incurred incident to their service. 32 C. F. R. (1949 Ed.) 750.3(c) (1).

Following the general principle of deference to administrative construction, this Court has often recognized that such a consistent administrative construction "is entitled to great weight, and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States v. Jackson*, 280 U. S. 183, 193." *United States v. Citizens Loan & Trust Co.*, 316 U. S. 209, 244; *United States v. Madigan*, 300 U. S. 500, 505. This general rule has, of course, special applicability to legislation as new as the Federal Tort Claims Act, for "administrative practice, consistent and generally unchallenged * * * has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Assn's., Inc.*, 310 U. S. 534, 549; *Adams v. United States*, 319 U. S. 312, 314-315; *Edward's Lessee v. Darby*, 12 Wheat. 206, 210.

Neither the Language Nor the Statutory Scheme of the Federal Tort Claims Act Will Permit Recovery Thereunder of Damages Resulting from a Service-Incident Injury Negligently Inflicted by One Member Upon Another Member of the Armed Services

The statutory scheme of the Federal Tort Claims Act and the language employed to carry that scheme in effect are totally unsuited to deal with claims arising out of injuries negligently inflicted by one member of the armed forces upon another. The United States did not make itself unqualifiedly liable in tort. It accepted liability only for the negligent acts of its employees, acting within the scope of their employment in circumstances where the United States, if a private person, would be liable. In other words, its only liability under the act is that which could be imputed to it under the doctrine of *respondent superior*. *United States v. Campbell*, 172 F. 2d 500 (C. A. 5), certiorari denied, 337 U. S. 957; *United States v. Elazer*, 177 F. 2d 914 (C. A. 4), certiorari denied, 339 U. S. 903. Under that doctrine of vicarious liability, the employer may be held liable only for the conduct of an employee who himself would be legally liable for that conduct in an action for damages. If the party who actually causes the injury is free from civil liability, it is obvious that "his employer must also be entitled to a like immunity." *N. O. & N. E. Railroad Co. v. Jopes*, 142 U. S. 18, 24. Accordingly, under the Federal Tort Claims Act, if the act of the

federal employee, whose negligence is alleged, would cast no personal legal responsibility upon him, it follows that no responsibility can attach to the United States as his employer.

It has long been established that a soldier, in an action instituted by another soldier, may not be held personally liable for his negligence occurring in the course of their military service. The common law has steadfastly refused to recognize the right of a soldier to maintain an action against another soldier or against his officer for improper conduct while on duty. *Johnstone v. Sutton*, 1 T. R. 492, 99 English Reprint 1215; *Keighly v. Bell*, 4 Fost. & Fin. 763; *Edmonson v. Randle*, 19 T. L. R. 356, 359; *Warden v. Bailey*, 4 Taunton 67. Even where the defendant soldier's conduct has been motivated by malice, the English courts have refused to accord a right of action to a plaintiff soldier. *Duckins v. Paullet*, L. R. 52, B. 94 (1869). This same immunity from liability on the part of a soldier with respect to a suit instituted against him by another soldier for acts performed in the course of his duty has also been regularly acknowledged in the United States. *Martin v. Mott*, 12 Wheat. 19; *Pinsman v. Wilkes*, 12 How. 309;¹⁰ *Vanderheyden v. Young*, 11 Johns. 150 (N. Y.); *Wright v. White*, 166 Oregon 136.

Underlying this well-established rule of law are

¹⁰ Certain language in this case indicates that malice on the part of the defendant would strip him of the immunity otherwise available to him as a defense. However, later cases

considerations similar to those which, as noted above, pp. 21-28, show that Congress did not intend to subject the United States to any direct liability to soldiers for their service-caused injuries. Thus, the cases denying the right of a serviceman to maintain suit against another serviceman frequently point out that any other result would vest the civil courts with power to review military actions. This judicial intrusion and its accompanying sacrifice of the military establishment's right to self-regulation must be avoided if discipline, without which the armed forces "would be a rabble, dangerous to their friends, and harmless to their enemies,"¹¹ is to be maintained. *Tyler v. Pomroy*, 8 Allen 480, 484 (Mass.); *In re Mansergh*, 1 Best & Smith, 400, 405. Other cases demonstrate that allowing suits between servicemen would mean that "any act done by any person in furtherance of [military] orders, would subject him to a responsibility in a civil suit * * *. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation." *Martin v. Mott*, 12 Wheat. 19, 30; *Johnstone v. Sutton*, 1 T. R. 492, 99 English

reveal that even where his acts are alleged to be malicious, the defendant may avail himself of the same rule of immunity. *Randall v. Brigham*, 7 Wall. 523, 536; *Alzua v. Johnson*, 231 U. S. 106, 111; *Bradley v. Fisher*, 13 Wall. 335, 347; *Yaselli v. Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503; *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949.

¹¹ *Johnstone v. Sutton*, 1 T. R. 492, 99 English Reprint 1215. See also pp. 25, 26, *supra*.

Reprint 1215; see *Herlihy v. Donahue*, 52 Mont. 601; *McCall v. McDowell*, 15 Fed. Cases 1235, 1240 (C.C.D. Cal., No. 8673). This threat of potential litigation, if such suits were recognized, would undoubtedly impair military efficiency. It is at least "as essential to the fearless and independent exercise of the authority conferred upon officers of the army and navy to enforce military discipline that they be free from the apprehension of vexatious suits grounded upon their official acts, as it is that a like immunity should be enjoyed by the judges of our civil courts." *Wright v. White*, 166 Oregon 136, 148.¹²

But whatever the basis of the rule prohibiting suits between servicemen on claims for damages caused by their military service, it is clear the rule would be fully applicable if the instant action had been directed against the negligent Army medical officer rather than against the United States.

¹² *Weaver v. Ward*, Hobart 135, 80 English Reprint 284, comes to a different conclusion. That case, which was decided in 1616, does not take into account any of the considerations relied on by the subsequent cases, has never been followed and has in effect been repudiated by the consistent line of subsequent cases.

Little v. Barrand, 2 Cranch 170; *Mitchell v. Harmony*, 13 How. 115; *Bates v. Clark*, 95 U. S. 204; *Franks v. Smith*, 142 Ky. 232; *Bishop v. Vandercook*, 228 Mich. 299; and *State v. Spurlis*, 27 Tex. 627 (See petitioner's brief in the *Jefferson* case, No. 29, this Term, pp. 12-13), holding that military or naval personnel may be held liable for torts committed by them against civilians, are, of course, inapposite in a situation where the tort was committed by one member of the armed forces against another member of those forces in the course of their military service. In those cases, considerations of military discipline were not significant.

Both Lt. Colonel Griggs and the Army medical officer were on active duty and acting under military orders; the former to submit to the operation, the latter to perform it. Since that operation was a direct incident of the military relationship between Lt. Colonel Griggs and the Army surgeon, there can be no doubt that the latter could not be held personally liable for his negligent conduct in the course of the operation which he had been directed to perform. And, in the absence of personal liability on his part, the doctrine of *respondent superior* prohibits the imposition of any derivative liability upon the United States under the Federal Tort Claims Act.

IV

Reversal of the Judgment Below Would Not Leave Respondent Financially Unprotected

For the reasons set forth above we submit that respondent's claim for the death of her husband, incurred incident to his service and as a result of the negligence of other military personnel, is not actionable under the Federal Tort Claims Act. That does not mean, however, that the United States, under other statutes and regulations, is not compensating respondent for her loss. She is still entitled to the full benefits and payments under the appropriate military and veterans' benefit laws. In fact, as shown in the letter from the Veterans' Administration (R. 25), respondent, in the two-

year period immediately after her husband's death, received from the United States, on account of the death of her husband in service, pension payments in excess of \$2,100. It is also estimated that her total pension payments from the United States will aggregate an additional \$18,000.¹³ Moreover, as stated in a letter from the Department of the Army (R. 26), respondent has also received from the United States, because of the death of her husband in service, the sum of \$2,695, representing the six months' death gratuity under the Act of December 17, 1919, as amended, 41 Stat. 367, 57 Stat. 599, 10 U.S.C. 903.

It is significant to note that these payments under the military and veterans' laws total an expected amount in excess of \$22,000. This figure must be compared the \$15,000 limitation imposed by Illinois law on recoveries in wrongful death actions. Act of July 18, 1947, Laws of Illinois, 1947 (p. 1094).¹⁴ That limitation, as respondent points out in her complaint, applies to the instant suit under the Federal Tort Claim Act (R. 4).

¹³ This estimate is based upon the receipt of a \$75 monthly payment over an expected life span of 20 years for a 55 year old woman (U. S. Life Tables and Actuarial Tables 1939-1941, Thomas N. E. Greville, Government Printing Office, 1946, p. 37); and see letter from Veterans' Administration stating that respondent was 53 years of age when her husband died in December, 1947 (R. 4, 25-26). The estimate also assumes that the appellant will not remarry and thus become ineligible for monthly payments.

¹⁴ This Act amended the Illinois Injuries Act, Illinois Revised Statutes, chapter 70, so as to increase the maximum liability in a wrongful death action from \$10,000 to \$15,000, effective July 18, 1947. *Monroe v. Chase*, 76 F. Supp. 278 (E.D. Ill.).

Consequently, any possible liability here on the part of the United States could not exceed the sum of \$15,000, diminished by the value of past and prospective payments made by the United States to respondent under the military and veterans' laws on account of the same death which forms the basis of the instant action. *United States v. Brooks*, 176 F. 2d 482 (C.A. 4).¹⁵ Since the payments under the military and veterans' laws are expected to exceed the \$15,000 maximum recoverable, there apparently could be no recovery of damages in the instant case even if service-caused deaths were held to be compensable under the Federal Tort Claims Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed.

PHILIP B. PERLMAN,

Solicitor General,

H. G. MORISON,

Assistant Attorney General,

NEWELL A. CLAPP,

Special Assistant to the Attorney General,

PAUL A. SWEENEY,

JOHN R. BENNEY,

MORTON HOLLANDER,

Attorneys.

SEPTEMBER 1950

¹⁵ This decision, dealing with the question of diminution of damages, was handed down by the Court of Appeals for the Fourth Circuit on remand of the *Brooks* case to that court by this Court.

APPENDIX

Sections 1346 (b), 1402 (b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act]¹⁶ provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 1402. *United States as defendant.*

* * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff

¹⁶ See footnote 1, *supra*, p. 2.

resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U. S. C. 2680. *Exceptions.*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.